89-1680

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LOUIS SOLARO,

Petitioner,

vs.

MONICA CASALINOVA

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Ninth District Court of Appeals
For Summit County, Ohio

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QUESTIONS PRESENTED

I

WHETHER DUE PROCESS IS DENIED WHEN HIGHLY RELEVANT EVIDENCE IS ARBITRARILY AND INDEFENSIBLY EXCLUDED, AS WAS DONE HERE.

II

WHETHER THE COURT ERRED, OR ABUSED ITS DISCRETION, WHEN IT FAILED TO CREDIT, NOT ONLY THE FACT THAT COUNSEL OPPOSITE KNOWINGLY AIDED AND ABETTED A DISBARRED ATTORNEY IN THE UNAUTHORIZED PRACTICE OF LAW, BUT ALSO IN FAILING TO REGARD COUNSEL'S INDEFENSIBLE ACTIONS AS A SUFFICIENT BASIS FOR VACATING A DEFAULT JUDGMENT ENTERED (UNBEKNOWNST TO DEFENDANT) SHORTLY AFTER SETTLEMENT NEGOTIATIONS BROKE OFF.

III

WHETHER DUE PROCESS IS SATISFIED WHERE (AS HERE) THE COURT FAILS OR REFUSES TO VACATE A DEFAULT JUDGMENT WHEN IT IS SHOWN THAT THE PROOF OFFERED IN SUPPORT THEREOF FAILED TO ESTABLISH, EITHER, THE CLAIMS ASSERTED IN THE ALLEGED CAUSES OF ACTION, OR THE PLAINTIFF'S ENTITLEMENT TO THE DAMAGES AWARDED.

IV

GIVEN THE FACT THAT RULE 408 OF THE OHIO RULES OF EVIDENCE BARS THE USE

OF EVIDENCE SHOWING SETTLEMENT OFFERS TO PROVE THE VALIDITY OR INVALIDITY OF A CLAIM OR DEFENSE THERETO, DOES A COURT VIOLATE DUE PROCESS AND THE LAW, WHEN IT RULES THAT A PARTY (HERE THE PETITIONER) LACKED A MERITORIOUS DEFENSE BECAUSE HE OFFERED TO SETTLE THE CIVIL COMPLAINT MADE AGAINST HIM?

V

WHERE THE PARTIES TO A PENDING CIVIL SUIT FOR DAMAGES ACTIVELY ENGAGE IN SETTLEMENT NEGOTIATIONS, IN WHICH A SUBSTANTIAL SETTLEMENT OFFER IS MADE AND REJECTED, IS NOTICE REQUIRED TO BE GIVEN AS TO THE FILING OF A MOTION FOR A DEFAULT JUDGEMENT WHICH OCCURRED A FEW DAYS AFTER NEGOTIATIONS BROKE OFF AND WAS SCHEDULED FOR HEARING TWO (2) DAYS LATER?

VI

WHERE THE FACTS SHOW EXCUSABLE NEGLECT, DOES A COURT ERR WHEN IT REFUSES TO VACATE A DEFAULT JUDGEMENT?

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NO. _____

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Louis Solaro, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals,

which judgment became final on January 17, 1990 when the Supreme Court of Ohio denied further appellate review.

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are Amendment XIV of the United States Constitution and Rule 60 (B), Ohio Rules of Civil Procedure.

OPINIONS BELOW

The judgment entry by the Supreme Court of Ohio denying further review is set forth at Appendix "A" in the Appendix to this Petition, at page A1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "B", at page A2.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on January 17, 1990. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

STATEMENT OF THE CASE

The appeal taken to the Ohio Supreme Court was a challenge to an affirmance of a trial court's denial of "A Motion For Relief From Judgment". As indicated above the Opinion referred to is attached to this Petition in the Appendix and designated Appendix "B".

The facts involved in this cause show, as the trial judge determined in its Judgment Order denying our Motion For Relief From Judgment, etc. (see Appendix "C"):

> 1. A complaint was filed by the Plaintiff November 9, 1988 and served upon the

defendant November 17, 1988. The answer date was then 28 days therefrom or December 15, 1988.

2. The defendant then contacted James Barbuto, a non-lawyer, to transmit to plaintiff's counsel an offer of $20,000 to resolve the case which was refused.

3. The said James Barbuto then relayed to the defendant that he was "not to worry" about the answer date.

4. This defendant knew of the answer date and the necessity for an answer within a certain time.

5. After the answer date had passed and on the 20th day of December, 1988, defendant retained an attorney.

6. On the 28th day of December, 1988, the plaintiff filed for default judgment, and the court scheduled this matter for 8 a.m. on the 30th day of December, 1988. On the same date defendant's counsel filed a leave to plead, which of course, was unknown to the Court or

> counsel since it was filed after the hearing at approximately the same time a default entry was entered on behalf of the plaintiff in this cause.

See Appendix "C", infra p. A-26 to A-28.

The facts here also show other relevant pleadings by the parties. Included in those filed by counsel opposite are certain critical judicial admissions. Here our reference is to certain of counsel opposite's critically important, judicial admissions. These showed he dealt with, and utilized, the ex-lawyer Barbuto as an intermediary in an effort to settle this lawsuit. See, Transcript of Proceedings, dated March 1, 1989, at pp. 33-34 and 36-38. Granted, counsel opposite denies that he authorized Barbuto to make certain representations testified to by Solaro in

sworn testimony (Tr., 11-13) and in various affidavits filed in connection with this cause. Still the incontrovertible fact remains, as was contended below (Tr., 35-37), counsel opposite acted in defiance of very specific ethical standards by negotiating the possible settlement of litigation with one he knew was barred from practicing law. See DR 3-101 (B), Model Code of Professional Responsibility and Rule 5.6 (b), ABA Model Rules of Professional Conduct.

Indeed, the Record of the hearing shows, as does the Court's Judgment Order, that the trial Judge refused to consider it to be a fact that it was on Friday December 16, 1988, the day after the deadline for seasonably filing the Answer, that Barbuto communicated

Blakemore's rejection of the final settlement offer. Additionally, the Court refused to credit the fact that Blakemore's act of choosing Barbuto must be regarded as his utilization, as an emissary, of one who was barred from acting as a negotiator in legal matters of this ilk (Tr., 35 et. seq.). Clearly such a task is assigned to lawyers authorized to practice in the Court where such matters are pending.

Because this is so, it was argued in the Written Exceptions To The Court's Order that Blakemore's use of Barbuto "in settlement negotiations seems clearly to be an act that can be viewed as assisting Barbuto in the unauthorized practice of Law". And for that he is surely accountable.

Also of significance here, in the trial court's Judgment Order, the Court further determined (1) that "no where in the Record does it show that counsel for the plaintiff indicated to Barbuto [referred to by the Court as the non-lawyer with whom counsel opposite had dealings in connection with a possible settlement offer] that he did not have to worry about the answer date" Appendix "C", infra, p. A-29.

And, (2) the Court reasoned and so found that because a settlement offer of twenty thousand dollars ($20,000.00) was made, this was a fact that "certainly leads one to believe there is questionable merit to the defense of this cause" (id., 3). Even this is not all, (3) by inference, the Court further concluded this rationale applied full

strength to the full extent of the prayer for damages, which was the Order of the Court.

II

In taking formal exceptions to the Court's Order, here being appealed, it was specifically argued with reference to the findings by the Court, that:

> Here the point being overlooked, and obviously not considered by the Court, is the evidence provided by Blakemore showing he undoubtedly authorized Barbuto to inform Solaro that while negotiations were in progress he did not have to worry about responding to the Complaint.
>
> When considered along with Solaro's testimony that Barbuto only told him the offer was rejected after the deadline for filing, on December 17, 1988, the conclusion reached by the Court becomes in our judgment, not only unreasonable, but indefensible.

> This follows because it is an incontrovertible fact that Barbuto was also utilized as an agent by Blakemore to give Solaro certain assurances (i.e., [1] not to worry as long as negotiations were in progress, but, [2] to carry the word relative to the rejection of the final offer).
>
> So postured, while Blakemore says he told Barbuto of the rejection on December 9, 1988, Solaro's testimony that he was only told on December 16, 1988 was not disputed. Indeed, Solaro's testimony that he told Barbuto during the conversation on Friday, December 16, 1988 seems especially credible since it was coupled with the fact that the lawyer he wanted to contact would be in Akron on December 20, 1988 for a hearing that had not even been scheduled on December 9, 1988.

Also, an additional protest was lodged against the Court's utilization of proof of the settlement offer (that had

been communicated back and forth between the parties, in the wake of negotiations conducted by Blakemore with, and through ex-lawyer Barbuto) as proof that our petitioner lacked a meritorious defense to any aspect of the claims made against him.

Even this is not all, the very serious complaint was also made over the Court's refusal to deal with, or otherwise address even slightly, the issues raised under favor of DR 3-101 (B), Model Code of Professional Responsibility and Rule 5.6 (b), ABA Model Rules of Professional Conduct.

III

Also, it is significant here that the Court excluded and refused to consider certain very critical evidence at the Hearing on our Motion. The significance

of this evidence becomes even more apparent in the light of Blakemore's testimony that, while he entrusted Mr. Barbuto (a disbarred lawyer) to convey his (Blakemore's) final rejection of the settlement offer, he had no way of knowing what day Mr. Barbuto conveyed Blakemore's rejection to Solaro (Tr., 38). Thus it follows Blakemore simply could not dispute Solaro's testimony that he (Solaro) only learned of this fact after the time for seasonable filing had passed (Tr., 16-17). We deem this fact to be one of critical importance.

For reasons that cannot be validated, the Court of Appeals simply refused to factor into its resolution of the dispositive issues counsel opposite's clear-cut ethical misconduct. The same is true of the extent to which our

petitioner was prejudiced thereby. Yet, in spite of the admittedly erroneous exclusion of relevant evidence, the Court of Appeals ruled the Record did not bear out our undeniably critical contentions (Opinion - Appendix "B", infra at p. A-10).

Here too the Record shows the Court also excluded the testimony of one Kay Williams -- the attorney who Solaro previously testified was present during critical aspects of his conversations with Barbuto. The Record shows the following occurred:

> MR. WILLIS: Under Rule 103 we will make a proffer that if permitted to testify Miss Williams would verify that she was at Tangier's Restaurant with a friend of hers and Mr. Solaro on the 25th of November; that the conversation centralized at least one point the deadline for the filing of

> any response; and Mr. Barbuto made the categorical representation that no action would be taken and that, quote, his word is his bond, and that statement was made in the presence of Miss Williams who indicated some concern about the fact that the time would be running out. And the conversation talked in terms of Mr. Barbuto -- Mr. Blakemore going on vacation, and Mr. Solaro indicated that he wasn't worried; but Miss Williams indicated that he ought to be worried because the time was running out and it was at that point that Barbuto gave the categorical representation that no action would be taken, he would have an ample opportunity to get an attorney and that his word was his bond, no action would be taken. That would be the essence of her testimony.

Tr., at 28.

Other critical testimony was proffered into the Record in the wake of the Court's refusal to allow Solaro to

testify as to the precise message Barbuto attributed to Blakemore. Here the Record shows:

> THE COURT: Wait a minute. The time -- if Blakemore isn't present, he can't give the conversation.
>
> MR. WILLIS: But except at this time he's acting as an agent for Mr. Blakemore.
>
> THE COURT: Who is?
>
> MR. WILLIS: Mr. Barbuto.
>
> THE COURT: No, sir, he said he called Barbuto. He called Barbuto.
>
> MR. WILLIS: I understand.
>
> THE COURT: I can't permit it.
>
> MR. WILLIS: If the Court please, I'd like to proffer the answer.
>
> The answer -- and I want the Court and the record to show that I take the position at this point that

he is -- that Mr. Blakemore is also -- I'm sorry, that Mr. Barbuto is also acting as an agent for Mr. Blakemore because he's carrying messages into that extent.

THE COURT: I understand what you're saying. It's just that it's hearsay as far as that's concerned at this point.

Go ahead.

MR. WILLIS: If permitted to answer -- we make this proffer under Rule 103 -- if permitted to answer, Mr. Solaro would state that Mr. Barbuto indicated to him that Mr. Blakemore had stated that no action would be taken if the case was not ultimately settled and that he would have an ample opportunity to obtain an attorney and to file an answer and that Mr. Blakemore's word was his bond and that statement was made in the presence of Kay Williams.

THE COURT: Okay. Go ahead.

Id., 12-13.

The Record with reference to the above excluded evidence shows our petitioner took very specific exceptions to the Court's ruling. See Written Exceptions To Court's Exclusion Of Certain Evidence As Hearsay. As argued below we contended then, as we do now, that this evidence was not excludable and was proper for the Court to consider.

In a nutshell then, the conclusion by the Court of Appeals was that the "testimony of Solaro, proffered and otherwise corroborated by the testimony of Blakemore, demonstrates that Solaro was aware of Casalinova's rejection of settlement negotiations some fourteen days prior to entry of default, and thus was aware that Blakemore would no longer delay prosecution of the lawsuit." In

addition to being flawed and unrealistic and lacking in factual support, this ad hoc conclusion was also rendered in spite of the facts, which show detrimental reliance on one chosen by counsel opposite to convey the rejection of the offer. And, it is also illogical, indeed it is a non-sequitur to reason that their analysis shows Solaro was aware Blakemore would no longer "delay prosecution of the lawsuit" (ibid). This is so because it simply does not follow that Solaro had to be lying when he testified as to the precise assurances Barbuto gave him, while speaking for Blakemore in communicating the rejection of the offer.

It is this fact that really exposes the unwillingness of the Appellate Court to deal with counsel's ethical violations to be an indefensible abdication of its

responsibility to the bar. For our part, the Court was quite willing to premise its resolutions against our case on Blakemore's use of Barbuto (the disbarred lawyer) with having communicated the rejection of the offer (ibid), while at the same time refusing to label such use as unethical.

Given the appellate court's eager willingness to premise its resolutions against our positions with reference to Blakemore's use of the disbarred lawyer (i.e., Barbuto) to communicate a rejection of the settlement offer, it simply makes no sense, and is certainly an example of flawed rhetoric, to refuse to allow Blakemore's use to cut both ways.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The issues in this case clearly make this a cause that should be dealt with by the Court in a manner that clearly spells out meaningful resolutions. Indeed the fact that an attorney, in defiance of ethical proscriptions, actually entered into negotiations with a disbarred attorney to the end that pending litigation could be settled is hardly something that should not be factored in any of the resolutions made.

Additionally, it is clear that counsel opposite had to know the advent and transpirations of the extended negotiations would perforce delay the joining of the issues in court, where all such issues should be dealt with. Thus, to penalize this petitioner, as the trial court did, really makes no sense at all.

This is particularly so since there is no way counsel should have given the disbarred attorney any status whatsoever in connection with a case duly filed by him.

Also discussed below are very serious evidence issues. The bottom line then is, this Court should upon review correct the injustice that has been visited on this petitioner. Simply put, the contentions in the original complaint should be resolved by a jury in the traditional way and not in the wake of what clearly appears to have been some very clever moves that were undertaken with guile.

ARGUMENT NO. I

Due Process Is Surely Denied When Highly Relevant Evidence Is Arbitrarily And Indefensibly Excluded As Was Done Here.

The Court, ostensibly under favor of Rule 801, Ohio Rules of Evidence, excluded certain evidence which was proffered on the basis of Rule 103. While this evidence was also offered as substantive proof to the extent that it showed counsel opposite entrusted Mr. Barbuto to deliver his final rejection of Solaro's settlement offer, it was also offered for purposes that clearly were outside the hearsay rule. Indeed, by definition, evidence that is not offered as proof of the truth of the matter asserted is simply not excludable as

hearsay. See, 801 (C), Ohio Rules of Evidence.

So postured, we again contend that evidence showing the assurances given Solaro, which Barbuto attributed to Blakemore, were at least admissible (if not for their truth) to show what Solaro was in fact told and had relied upon. Cf., United States v. Parry, 649 F.2d 292 (5th Cir. 1981). Stated another way, the statements made by Barbuto were relevant because they explained Solaro's subsequent conduct.

In more fully developing our thesis, we begin with an obvious rule, known to all, that hearsay is not admissible, Rule 802, Ohio Rules of Evidence. On the other hand, it seems clear enough that no statement is inherently hearsay. Whether a statement is hearsay depends upon what

use the offeror intends the fact-finder to make of it. In the context of this case, the question is whether these excluded statements were offered to prove something relevant to the issue before the Court other than the truth of the assertion included therein.

Here the statements were not offered to prove that Blakemore in fact authorized Barbuto to advise Solaro of anything in addition to the fact that his offer of settlement had been rejected. Rather they were offered to show that Barbuto in fact told Solaro all during the negotiation phases and when he (Barbuto) communicated the final rejection, that he (Solaro) would not be penalized for any delay in filing his response papers in Court.

Simply put, none of the hearsay dangers are present in this situation, for what is involved here is not Barbuto's credibility, but Solaro's state of mind. For without regard to the truth of the statements communicated to him by Barbuto, it is a cogent inference that inasmuch as Barbuto indisputably and correctly informed Solaro of Blakemore's rejection of the offer, Solaro was also told Blakemore would not penalize him if he was late in formally responding in the litigation pending against him.

When viewed in this sense, i.e., as bearing on Solaro's state of mind, the evidence did not fall within the definition of hearsay given by Rule 801 (C) because it was not offered to prove the truth of tne matter asserted.

So postured the proffered evidence could have helped establish, as Solaro contended, his failure to seasonably respond was based on what he had been told by Barbuto -- the person Blakemore had commissioned to convey his rejection of the final settlement offer.

Apart from the fact that Blakemore's dealing with the disbarred attorney, Barbuto, could rightly be regarded as a criminal offense by him (i.e., aiding and abetting Barbuto in the unauthorized practice of law), it can hardly be as the Court of Appeals held, that the excluded evidence would only have been, in effect, cumulative. Clearly, the points sought to be established by this wrongly excluded evidence are at odds with the Court's notion that Solaro failed to satisfy the prejudice requirement, which

the Court of Appeals declared was not "demonstrate[d]" (Opinion - Appendix "B", infra, p. A-8).

Significant here, a careful reading of the Opinion shows the Court of Appeals actually conceded the validity of the point sought to be established by the proffered evidence (id., at A-). And, it seems clear enough the Court was likewise willing to even concede the proffered proof was wrongfully excluded. Having said that, the Court then proceeded to resolve itself into an appellate jury (of sorts) and then decreed that Solaro did not demonstrate that he was prejudiced. (Ibid.)

This conclusion, in addition to being arbitrary, is inaccurate at best. For clearly, proof that Solaro was in fact given by Barbuto the assurance

attributed to Blakemore would surely have benefited Solaro.

ARGUMENT NO. II

The Court Erred, Or Abused Its Discretion, When It Failed To Credit, Not Only The Fact That Counsel Opposite Knowingly Aided And Abetted A Disbarred Attorney In The Unauthorized Practice Of Law, But Also In Failing To Regard Counsel's Indefensible Actions As A Sufficient Basis For Vacating A Default Judgment Entered (Unbeknownst To Defendant) Shortly After Settlement Negotiations Broke Off.

In this cause, we start with the indisputable fact that counsel opposite clearly was aware that James Barbuto was a disbarred attorney. Yet, despite this fact he, either, allowed Barbuto to represent the defendant in settlement negotiations, or he (i.e., counsel opposite) allowed Barbuto to associate himself with the plaintiff's alleged cause in the settlement of the negotiations that followed. See DR 3-101 (B), Model Code of Professional Responsibility and Rule 5.6 (b), ABA Model Rules Of Professional Conduct.

Of significance here, even apart from the proffered evidence, the facts showed that during discussions had with Barbuto, in the presence of various witnesses (including Attorney Kay Williams), the time interval for formally

responding to the Complaint was specifically discussed. Indeed this proof shows it was factored into all of the negotiations that followed.

Significantly, as indicated above, Mr. Barbuto's considerable efforts were specifically credited in the plaintiff's response papers and in Blakemore's testimony (Tr., 38). Solaro, of course, credited Barbuto with having communicated to him the categorical representation that there was no need to worry about the pleading deadline because Blakemore had given his word that no action would be taken as long as settlement discussions were taking place. And, that even if the negotiations failed and the time elapsed our petitioner would be given more than ample time to retain counsel and to respond.

Also, the facts show beyond dispute that during the early part of December our petitioner was in regular contact with Mr. Barbuto; who, according to Solaro (our petitioner), informed him that Blakemore was going on vacation and that his (Solaro's) settlement offer could only be communicated by Blakemore to his client after Blakemore's return. Additionally, Solaro's proof showed that it was on Friday, December 16, 1988, that Barbuto told our petitioner the $20,000 offer was finally rejected. Solaro was asked, by Barbuto, even then, what was his best offer over that indicated sum. Presumably, Barbuto would have conveyed any other offer made to Blakemore.

Additionally, the facts, as developed by Solaro, revealed that when Solaro told Barbuto he needed time to get

an attorney, Barbuto repeated that he should not worry because "Blakemore's word was his bond" and that there was really no hurry and that if he could take care of it in the next couple of weeks or so that would be satisfactory.

On the ethical question, which exists apart from the question of detrimental reliance, Blakemore's knowing utilization of Barbuto (an ex-lawyer) as his emissary in settlement negotiations seems clearly to be an act that can be viewed as assisting Barbuto in the unauthorized practice of law. See, State v. Schumacher, 214 Kan. 1, 519 P. 2d 1116 (1974), where the Court viewed the participation of an ex-attorney in settlement negotiations with opposing counsel on pending litigation as practicing law. So in this case,

Barbuto's participation in these negotiations in which Solaro was assured he would not be penalized for any tardiness in filing a seasonable Answer to the Complaint must be viewed as the type of representation an attorney would make as an officer of the Court. This is particularly so since, in this case, it related directly to pending litigation. Also see, Re Bodkin, 21 Ill. 2d 458, 173 N.E. 2d 440 (1961), another case where an ex-attorney attempted to negotiate a settlement of a claim for injuries.

The point of the above cases is made clear when one realizes that whether Barbuto is viewed as having acted as an agent for Solaro when he originally contacted Blakemore, or as an agent for Blakemore in communicating Blakemore's responses in the settlement negotiations,

his conduct must be viewed as the unauthorized practice of law. This being so, Blakemore's actions in carrying on negotiations with Barbuto, or in commissioning Barbuto to give Solaro assurances; as well as, in making other representations relative to pending litigation instituted by him must surely be measured in the light of those ethical tenets and clearly becomes aiding and abetting the unauthorized practice of law.

Here also, the Court should judge counsel by those tenets that prohibit an attorney from lending his name to one, or utilizing and crediting the efforts of one, he knows (or should have known) was engaging in the unlawful practice of law. See, In Re Quigley, 206 Minn. 20, 287 N.W. 105 (1939) and Re Lacy, 234 Mo. App.

71, 112 SW 2d 594 (1937). Once that is done, it seems only a reasonable conclusion that Blakemore having commissioned Barbuto to carry the news of the rejection of the settlement offer, must also bear the risk that Barbuto would not mislead the person with whom Blakemore was negotiating.

Simply put, it seems clear enough that if the activities of ex-lawyer Barbuto can be regarded as the unauthorized practice of law, then the actions of counsel opposite must be viewed as a violation of DR 3-101. This perforce follows since clearly it was improper for counsel to assist and direct Barbuto to the extent that he did. Cf., State ex. rel. Oregon State Bar v. Lenske, 243 Or. 484, 407 P. 2d 250 (1965), where unlike the action of

counsel opposite here, an attorney refused to discuss the possibility of a settlement with an ex-attorney. It would seem that Blakemore should have done the same.

The essential flaw in the position taken by the Court of Appeals is further illuminated by the fact that, in one breath, the Court was willing to find that on "December 16, 1988, ... [Solaro had] a discussion with Barbuto" (id., p. 11), during which he learned "Blakemore had communicated through Barbuto" word of rejection of his offer to settle. Yet, the Court inexplicably refused in its next breath, to credit Solaro's evidence, and proffered testimony, that Barbuto also assumed that he had Blakemore's word that no immediate action would be taken

on the case and that there was no cause to hastily respond.

ARGUMENT NO. III

Due Process Is Denied Where (As Here) The Court Fails Or Refuses To Vacate A Default Judgment When It Is Shown That The Proof Offered In Support Thereof Failed To Establish, Either, The Claims Asserted In The Alleged Causes Of Action, Or The Plaintiff's Entitlement To The Damages Awarded.

A most crucial aspect of the cause before this Court turns on whether all aspects of the judgment rendered against Solaro were supported by the testimony provided the Court. Here a study of the

Transcript dated December 30, 1988 (the Default Hearing) shows that the respondent contended the petitioner, Solaro, had violently assaulted her on December 30, 1987, by hitting her "in the stomach" and that she had a lump on her head. When asked if she consulted a doctor for these asserted injuries, her response was that she had seen a doctor before that time in 1984 and 1985 (Tr., 6) but for verbal abuse, which her doctor said could have been based on fears (ibid).

Respondent's March 17, 1988 complaint was based on what was said to be verbal abuse which paralyzed her with fear (id., 7). And, the proof bearing on the April 24, 1988 claim was that Solaro was sending her to see a psychiatrist (id., 8), who incidentally Solaro paid.

Distilled, the essence of the respondent's proof was structured to show (if it did) that she was verbally abused and suffered mental distress. For these things she reportedly visited Dr. Elaza, a psychiatrist. She says he encouraged her to actually see Jakes --the petitioner.

Dr. McClusky merely told her to "see somebody, a psychologist, psychiatrist" -- gave her a prescription and said Jakes "had a very powerful control over [her]" (id., 12). Respondent also saw a Dr. Orlando numerous times.

Respondent testified that our petitioner hit her in the face and in the stomach and that she was numb and black and blue (id., 5). Yet she never sought any medical treatment because she was afraid that her father would find out

(id., 5). Therefore, there was absolutely no medical evidence presented at all as to the alleged physical injuries. Before a judgment may be entered in a tort action, even though defendant fails to answer, proof of damages claimed by plaintiff must be presented. American Bankers Ins. Co. of Fla. v. Leist, 117 Ohio App. 20, 189 N.E. 2d 456 (1962).

The other inescapable conclusion is that when deciding a motion seeking relief from judgment, it is court policy to decide cases on their merits. Rafalski v. Oates, 17 Ohio App. 3d 65, 477 N.E. 2d 1212 (1984); Doodridge v. Fitzpatrick, 53 Ohio St. 2d 9 (1978). It is also incumbent upon the Court of Appeals to review a Motion to Vacate a Default Judgment with the theory of

deciding cases on their merits whenever possible. Rafalski, supra.

ARGUMENT NO. IV

Given The Fact That Rule 408 Of The Ohio Rules Of Evidence Bars The Use Of Evidence Showing Settlement Offers To Prove The Validity Or Invalidity Of A Claim Or Defense Thereto, A Court Clearly Violates Due Process And The Law, In Such Cases Made And Provided, When It Rules That A Party (Here The Petitioner) Lacked A Meritorious Defense Because He Offered To Settle The Civil Complaint Made Against Him.

The Court's utilization of the settlement offer made to counsel for the respondent in this litigation as proof of the lack of a meritorious defense fully demonstrates the court's ratiocinations in this regard are flawed, indeed almost beyond belief. See Rule 408, Ohio Rules of Evidence. Also see, Cannell v. Rhodes, 31 Ohio App. 3d 183, 509 N.E. 2d 963, 967 (1986). Cf., Fireman's Fund Insurance Co. v. BPS Company, 23 Ohio App. 3d 56 (1985). ("Rule 408 was written to limit the admissibility of an offer of compromise or of a completed compromise due to considerations that the compromise may have arisen from factors other than liability...."). The upshot of this analysis is that the court's reliance on the offer for any purpose not

only violates the letter, but the spirit of Evidence Rule 408.

Also, the court clearly must have forgotten that during Solaro's testimony, the court fully credited the Answer he had submitted to the court as being a sufficient indication of a defense. (See Transcript of Proceedings, dated March 1, 1989, pp. 23-24.) Indeed, the point here being contended for is well made in the following statement then made by the Court:

> THE COURT: He already testified there was something he denies the allegations in this complaint, so I'll accept that. The affidavit will not be admitted. I understand he offered a defense and he said it isn't true.
>
> MR. WILLIS: But in addition to saying it's not true, in the affidavit he mentions the fact that he

> suggested that she seek psychotherapy -- .

Ibid.

However, even apart from this insuperable fact, the trial Court concluded in its Judgment Order that the defendant's testimonial statements (i.e., that he had a "legitimate and valid defense" to the accusation in the complaint) did not satisfy, or equate with, the meritorious defense requirement seems clearly to be a flawed and indefensible rationale. (See Appendix "C", p. A-30.) Indeed, given (1) the showing of Solaro's denial that he committed any acts of physical abuse and/or aggression against the plaintiff-respondent, (2) his testimony and her admission of the flaws in her mental and emotional state that resulted in her

being treated at Solaro's suggestion and in some instances at his expense, and (3) the critical admission in her testimony that no proof of any medical treatment for alleged injuries exist, it can hardly be said that the damage award made here was justified even if everything alleged had been proven -- and it surely was not. American Banker's Insurance Fla. v. Leist, 117 Ohio App. 20, 189 N.E. 2d 456 (1962).

ARGUMENT NO. V

Where The Parties To A Pending Civil Suit For Damages Actively Engage In Settlement Negotiations, In Which A Substantial Settlement Offer Is Made And Rejected, Notice Was Required To Be Given As To

The Filing Of A Motion For A Default Judgment Which Occurred A Few Days After Negotiations Broke Off And Was Scheduled For Hearing Two (2) Days Later.

It is well settled in Ohio that if a party against whom judgment by default is sought has appeared in the action, he must be served written notice of the Application For Judgment at least seven (7) days prior to hearing. Nevertheless, there is nothing in the rule which prohibits a court from mailing notice to a party who has not appeared in the action. Jenkins v. Clark, 70 App. 3d 93, 454 N.E. 2d 541 (1982).

In Linder v. Community Development Association, Inc., 67 Ohio Op. 2d 314 (1974), the appellant appeared in the

action by filing a Motion For An Order Permitting The Filing Of An Answer. The court held that it was an abuse of discretion by trial court to deny this Motion to Vacate, when the record demonstrated that they had not been served with notice of the default hearing pursuant to Civil Rule 55 (A).

Here, the trial court determined in its Order dated March 16, 1989 that defendant only filed leave to plead after the default hearing had been scheduled and at approximately the same time a Default Entry was being entered on behalf of the plaintiff and therefore defendant had not made an appearance. Of course, the Court could just as easily have credited the fact that while the plaintiff filed the Motion for Default on December 28, 1988, and the trial court

scheduled the hearing on that Motion only two days later, i.e., December 30, 1988, the Record also verifies that indeed an appearance was in fact made on December 30, 1988 before the default entry was journalized.

In any event, it is obvious that the defendant intended to defend against the plaintiff's complaint. Additionally, the trial court acknowledged in its Judgment Order that negotiations to settle the case for far less than the prayers for damages had taken place and that the offer was $20,000.00. Although refused by plaintiff, that certainly could not be construed as an acknowledgement of either culpability or liability.

Indeed the trial court's acknowledgement that the defendant did indeed retain an attorney on December 20,

1988, and that an Answer was filed on the exact same day as the default judgment was granted and just minutes before the judgment was journalized, certainly projects a very real intent to defend.

On the other hand, it is interesting to note that the Hearing for the default judgment was held exactly two (2) days after the Motion was filed. Thus it follows that no matter how diligent Solaro's attorneys were, they could not have determined that a Default Motion was filed and a judgment would be entered so quickly. The date for the Hearing was not published, nor could it have been published within those two days, nor was its pendency reflected in the Clerk of Courts' records.

Most significant here, the critical facts show the filing of an Answer

occurred before the court, speaking through its Journal, granted the default judgment. This showing was augmented by the inconfutable fact that counsel opposite involved himself in serious settlement negotiations with the target of his lawsuit. So postured, the position taken by the Court of Appeals that petitioner was not entitled to notice of the default hearing is truly unrealistic. It also clearly conflicts with the Opinion rendered by the Court of Appeals (from a different Judicial District) in Linder v. Community Development Association, Inc., 67 Ohio Op. 2d 314, (1974). Indeed, the appellate court below fully recognized, and credited, this fact in ruling that "[it] cannot adopt [what it characterized

as Linder's] retrospective analysis." Opinion, Appendix "B", infra, at p. A-18.

Yet, in obviously failing to credit its own ratiocinations in this regard, the Court below inexplicably refused to certify to this Court the very conflict it was quite willing to recognize in affirming the trial court's rulings. (See Opinion, Appendix "B", infra, p. A-18.) In our judgment the positions taken by the Appellate Court with reference to Linder, supra, simply cannot be reconciled, except in an arbitrary manner somewhat likened to the way it was dealt with by the court below in its rush to judgment.

In our judgment, the position taken by the court below on this issue alone furnishes sufficiently substantial

reasons why this cause should be reviewed.

ARGUMENT NO. VI

Where The Facts Show Excusable Neglect, A Court Errs When It Refuses To Vacate A Default Judgment.

The trial court articulated the fear that chaos would rein in our system if non-lawyers were used to negotiate settlements or other legal procedures. On the other hand, the trial court was unwilling to credit the insuperable fact that it was the plaintiff-respondent's attorney who caused, or at least contributed to, the situation here. This counsel opposite did by involving himself (in defiance of clear-cut ethical standards) in the settlement negotiations undertaken, with reference to this

litigation, with a disbarred lawyer. Although the courts below refused to do so, surely this Court will note that during the Hearing on the Motion to Vacate, plaintiff's attorney, Robert Blakemore, admitted that his negotiations with Mr. Barbuto on behalf of the plaintiff included relaying the offer presented by defendant through Barbuto to the plaintiff, which offer she refused to accept. And, it included his utilization of Barbuto to relay the rejection.

The question one must then ask is, how is it that Solaro, a non-lawyer, should be held to a standard of care higher than that of the plaintiff's attorney, Robert Blakemore? Clearly it is most significant that, according to Solaro's evidence, the answer date had passed during the course of these

negotiations. This fact was well known to Attorney Blakemore, but not readily known by our petitioner.

So postured, it is at once obvious Attorney Blakemore took advantage of our petitioner's position with Mr. Barbuto by literally racing to the Courthouse to obtain a judgment to the extreme financial detriment of our petitioner. When viewed in this sense, it follows that any contribution made by Solaro to the chaos the court referred to, pales into insignificance when compared to Blakemore's ethical faux pas and misconduct in this case.

Next, we concede, as was held in G.T.E. Automatic Electric, Inc. v. A.R.C. Industries, Inc., 47 Ohio St. 2d 146 (1976), that certain requirements must be met to entitle a movant to an order

vacating a default judgment. In our judgment, this petitioner fully satisfied these requirements, but such was ignored by the trial court and the Court of Appeals.

Clearly, to prevail on a Motion pursuant to Rule 60 (B) of the Rules of Civil Procedure, the movant must demonstrate that (1) the party is entitled to relief under one of the grounds set forth in the Rule itself. Next, (2) the party has a meritorious defense to present if the relief is granted. And, (3) the motion is made within a reasonable period of time. See, G.T.E., supra; Volodkevich v. Volodkevich, 35 Ohio St. 3d 152 (1988).

There is clearly no question that the Motion was made in a reasonable time period. And, the petitioner clearly

maintained his innocence as evidenced by the Affidavit attached to his Motion. Also, it is being argued that petitioner's appearance in the settlement negotiations was in fact an "appearance" warranting petitioner's right to a seven day notice of the hearing. The fact that the pleadings in this matter were actually filed prior to the default judgment entry also warranted a seven day notice requirement.

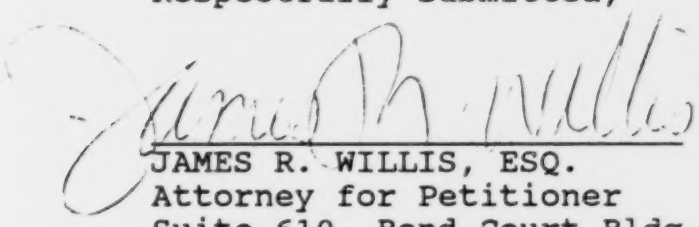
As to this latter point, it has been well settled in our courts that "... although ... [one] may not plead as of right after rule, or after the expiration of an extension of time, still a pleading so filed should not simply be ignored by the entry of a default judgment." Suki v. Blume, 9 Ohio App. 3d 289, 459 N.E. 2d 1311, at 1313 (1983). See also, McCabe

v. Tom, 35 Ohio App. 73, 171 N.E. 868 (1929).

CONCLUSION

For all the reasons argued above, the Petition prayed for should be granted.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 610, Bond Court Bldg
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was mailed to the office of Robert W. Blakemore, Attorney for Respondent, 277 South Broadway, Akron, Ohio 44308, this 17th day of April, 1990.

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

A P P E N D I X

THE SUPREME COURT OF OHIO

1990 TERM

To wit: January 17, 1990

Monica Casalinova, :
Appellee, : Case No. 89-1890

v. : E N T R Y

Louis Solaro, :
Appellant. :

Upon consideration of the motion for an order directing the Court of Appeals for Summit County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James R. Willis.

(Court of Appeals No. 14052)

THOMAS J. MOYER
Chief Justice

APPENDIX "A"

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) ss:	NINTH JUDICIAL
COUNTY OF SUMMIT	)	DISTRICT
MONICA CASALINOVA	)	C.A. NO. 14052
	)	
Plaintiff-Appellee	)	
	)	APPEAL FROM JUDG-
v.	)	MENT ENTERED IN
	)	THE COMMON PLEAS
	)	COURT
	)	COUNTY OF SUMMIT,
LOUIS SOLARO	)	OHIO
	)	CASE NO. 88 11
Defendant-Appellant	)	3625

DECISION AND JOURNAL ENTRY

Dated: September 27, 1989

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

HAYES, J. For purposes of this matter, a brief statement of the facts will suffice. Louis "Jakes" Solaro, appellant herein, and Monica Casalinova,

appellee herein, maintained a relationship of varied intensity from 1980 to 1988. In 1988, Mrs. Casalinova secured the services of attorney Robert Blakemore, and caused to be filed a complaint against Solaro alleging physical and mental abuse, with attendant injuries, on four separate occasions in late 1987 and in 1988. Casalinova prayed for just compensation and for $100,000 punitive damages. After being served with the complaint, but prior to the answer due date, Solaro transmitted an offer of $20,000 in settlement, conveyed to Attorney Blakemore by Solaro's agent for the task, former judge and attorney James Barbuto.

Blakemore relayed the offer to Casalinova, who then rejected the same. Blakemore informed Barbuto of this

rejection, which Barbuto relayed to Solaro. Solaro apparently made no further offers to settle, and eventually secured the services of an attorney five days beyond the answer due date. Eight days later, Blakemore moved for default judgment on behalf of Casalinova, and a hearing was held within two days on that motion. Solaro did not receive notice of either Casalinova's motion or the hearing date set thereon and filed a motion for leave to file his answer instanter, and his answer, on the hearing date. Solaro's documents were filed approximately twenty minutes prior to entry of the court's default judgment in favor of Casalinova, granting her relief on her complaint in the amount of $100,000.

Solaro thereafter moved the court to vacate its entry of default judgment

pursuant to Civ. R. 60(B). Following a hearing, the court denied Solaro's motion. Solaro appeals, asserting six assignments of error.

ASSIGNMENT OF ERROR I

> "The court erred or abused its discretion when it excluded certain relevant evidence."

At the hearing on Solaro's motion to vacate, he attempted to testify as to Barbuto's statements regarding Blakemore's rejection of the offer. Blakemore objected to such testimony on the basis of hearsay, arguing that Barbuto had not been called as a witness, and that Solaro could not offer Barbuto's statements as evidence. The court sustained the objection, and Solaro proffered that, if permitted to answer, he would state that Barbuto indicated that "*** no action would be taken if the case was not ultimately

settled and that he would have an ample opportunity to obtain an attorney and to file an answer ***." Solaro did testify that the conversation with Barbuto took place in late November, 1988.

Solaro argues that the trial court abused its discretion by excluding from evidence the statements attributed to Barbuto, and sought to be introduced by Solaro.

We initially note that this post-judgment hearing was held before the trial judge. A trial judge is presumed to have considered only competent and relevant evidence in matters before the court alone. This presumption prevails unless it is affirmatively shown that the trial judge was influenced to the prejudice of the complainor by the objected-to testimony. Gannett v. Booher (1983), 12 Ohio App. 3d 49, 54.

Blakemore himself took the stand as a witness during the hearing. During cross-examination by Solaro's counsel, the following exchange occurred:

"***.

"Q. And you never at any time represented to Mr. -- told Mr. Barbuto that he could represent that as long as the settlement negotiations were in progress, that he had nothing to worry about insofar as filing?

"A. I stated that correctly. You are correct about that. I told him that as long as honest and sincere negotiations were going on -- this is in early November, right at the time that Mr. Solaro had been served -- that I would not proceed and would give him time to obtain counsel. This is correct.

"***."

Thus, the statement which Solaro sought to testify to earlier in the hearing, and to which Blakemore's

objection was sustained, was essentially testified to and corroborated by Blakemore. Not only has Solaro failed to overcome the presumption set forth by Gannett, supra, by failing to demonstrate prejudice, any merit to the error assigned evaporated when Blakemore testified. Accordingly, Solaro's first error assigned is not well taken.

ASSIGNMENT OF ERROR II

> "The court erred, or abused its discretion, when it failed to credit, not only the fact that counsel opposite knowingly aided and abetted a disbarred attorney in the unauthorized practice of law, but also in failing to regard counsel's indefensible actions as a sufficient basis for vacating a default judgment entered (unbeknownst to defendant) shortly after settlement negotiations broke-off.

Solaro essentially argues that the court erred by not considering what he perceives to be a violation of ethical

codes by Blakemore in dealing with Barbuto, and by failing to vacate the default judgment thereon.

A motion for relief from judgment under Civ. R. 60(B) is properly addressed to the sound discretion of the trial court, and that ruling will not be disturbed on appeal absent a showing of abuse of discretion. Moore v. Emmanuel Family Training Ctr. (1985), 18 Ohio St. 3d 64, 66. In GTE Automatic Electric v. ARC Industries (1976), 47 Ohio St. 2d 146, paragraph two of the syllabus, the Supreme Court set forth the requirements to be met by a movant seeking vacation of judgment:

> "***.
>
> "2. To prevail on a motion brought under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one

> of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken."
>
> "*****."

Solaro asserts that Blakemore's allegedly unethical conduct in responding to Solaro through Barbuto rises to a level which satisfies the second of the above requirements, apparently Civ. R. 60(B)(3), as fraud, misrepresentation or other misconduct of an adverse party. Solaro claims that Blakemore's statement that Solaro would have ample time to respond to the suit belied Blakemore's intent to seek a default judgment against Solaro. The record does not bear out Solaro's complaint.

Solaro's own testimony established that he was aware, by December 16, 1988, one day beyond the answer due date, that his offers of settlement had been rejected, that Casalinova intended to pursue the suit, and that Blakemore had recommended that Solaro secure the services of an attorney. Solaro further testified that he knew the date on which an answer was due.

The record demonstrates that Solaro did not make contact with Blakemore regarding the status of the case following his December 16, 1988, discussion with Barbuto. Rather, he sought the services of counsel, which he secured on December 20, 1988. A full ten days passed before Solaro's counsel filed any documents with the court regarding the case, on December 30, 1988. On this same date, some fourteen

days after Blakemore had communicated, through Barbuto, Casalinova's rejection of settlement, default judgment was entered in favor of Casalinova.

The testimony of Solaro, proffered and otherwise, corroborated by the testimony of Blakemore, demonstrates that Solaro was aware of Casalinova's rejection of settlement negotiations some fourteen days prior to entry of default, and thus was aware that Blakemore would no longer delay prosecution of the lawsuit. Accordingly, finding no fraud, misrepresentation or other misconduct on the part of Casalinova or her counsel, Blakemore, under the requirements of Civ. R. 60(B)(3) and GTE Automatic Electric, supra, Solaro's second error assigned is not well taken.

ASSIGNMENT OF ERROR III

> "Due process is denied, where (as here) the court fails or refuses to vacate a default judgment when it is shown that the proof offered in support thereof failed to establish, either, the claims asserted in the alleged causes of action, or the plaintiff's entitlement to the damages awarded."

Solaro's error assigned herein is not relevant to Civ. R. 60(B) proceedings. See Civ. R. 60(B) and GTE Automatic Electric, supra. Solaro suggests that, in deciding a motion seeking relief from judgment, it is Ohio court policy to determine cases upon the merits presented. Doddridge v. Fitzpatrick (1978), 53 Ohio St. 2d 9. Solaro overlooks the fact that, as the December 30, 1988, hearing on the motion for default judgment, Casalinova offered testimony in proof of her complaint and the damages therein sought. Thus, the

matter was heard upon the merits presented.

Solaro directs us to American Bankers Ins. Co. v. Leist (1962), 117 Ohio App. 20, for the proposition that, before a default judgment may be entered in a tort action where the defendant has failed to answer, the plaintiff must present proof of damages. The record reveals that Casalinova testified to the assaults upon her person by Solaro, and to the injuries thereby inflicted. The trier of fact is afforded broad discretion in reaching its decisions. The standard for abuse of discretion has been defined as more than error of law or judgment, but implies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable. Ruwe v. Bd. of Springfield Twp. Trustees (1987), 29 Ohio St. 3d 59, 61.

Solaro has not assailed the decision of the trial court upon any of the above bases. Accordingly, the trial court, hearing the testimony as offered by Casalinova, could have reasonably concluded that she had indeed submitted proof of the injuries sustained, and the value thereof. Finding no abuse of discretion, Solaro's third error assigned is not well taken.

ASSIGNMENT OF ERROR V

> "The trial court erred in denying defendant's motion to vacate the default judgment as defendant had satisfied all the requirements of Rule 60(b) [sic]."

Solaro argues under this assignment that his motion for leave to file his answer instanter, and his answer, both filed on December 30, 1988, were sufficient for purposes of Civ. R. 55(A) to constitute Solaro's appearance in the case. We find this position untenable.

Civ. R. 55(A) provides:

> "Entry of Judgment. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application.***."

It is undisputed that Solaro received neither Casalinova's motion for default judgment, nor notice of the hearing date set by the court for consideration of the motion. It is also

undisputed that Solaro moved for leave to plead after Casalinova had moved for default, and after the hearing thereon had been set. The default judgment and Solaro's motions were filed minutes apart.

Solaro directs us to Linder v. Community Dev. Associates, Inc. (Hamilton App. 1974), 67 O.O 2d 314, for the proposition that moving the trial court for leave to file an untimely answer constitutes an appearance for purposes of Civ. R. 55(A). In Linder, the plaintiff filed his complaint, the defendant failed to answer within twenty-eight days of being served, and the plaintiff thereafter moved for default judgment, but did not serve defendant with a copy of the motion. Three weeks later, the defendant moved the court for leave to file an answer,

and plaintiff responded with a memorandum in opposition. The trial court granted default judgment.

Through strained reasoning, the appellate court determined that the defendant's motion for leave to file an answer constituted an appearance requiring plaintiff to have served defendant with plaintiff's motion for default some three weeks prior. Linder, supra, at 316. We cannot adopt this retrospective analysis, however, as requiring a plaintiff to so predict a defendant's future actions in seeking leave to plead would require the services of a clairvoyant. Because Solaro did not enter an appearance in the action, he was not entitled to notice of the default proceedings. Sexton v. Sugar Creek Packing Co.

(1974), 37 Ohio St. 2d 58. Solaro's fifth error assigned is not well taken.

ASSIGNMENT OF ERROR VI

"The court erred in refusing to regard defendant's actions as 'excuable neglect'."

In Antonopoulos v. Eisner (1972), 30 Ohio App. 2d 187, 194, the court determined that where failure to answer is attributable to a misunderstanding, such may be the basis for vacation of a judgment pursuant to the excusable neglect provision of Civ. R. 60(B)(1). The court went on to say, however, that relief may be properly denied where the judgment "*** resulted from deliberate action, or the moving party or his attorney made an informed choice, but not the best choice." Id. The neglect of an individual to seek legal assistance after being served with court papers is not excusable. Associated

Estates Corp. v. Fellows (1983), 11 Ohio App. 3d 112, 116.

The record demonstrates that by December 16, 1988, Solaro was aware of the need to retain counsel and to file an answer responding to the complaint. Solaro's counsel was also made aware of this position on December 20, 1988, when Solaro secured his services. Reading Blakemore's statement regarding the status of the action during settlement negotiations in its broadest sense, Solaro was placed on notice, on December 16, 1988, that Blakemore would proceed to zealously prosecute Casalinova's cause. Solaro therefore made an informed, if unfortunate, choice to delay seeking a leave to plead until December 30, 1988. See Antonopoulos, supra. The trial court correctly found an absence of excusable neglect.

Accordingly, Solaro's sixth error assigned is not well taken.

ASSIGNMENT OF ERROR IV

> "Given the fact that Rule 408 of the Ohio Rules of Evidence, bars the use of evidence showing settlement offers to prove the validity of invalidity of a claim or defense thereto, the court erred in ruling that Solaro (the appellant) lacked a meritorious defense because he offered to settle the complaint made against him."

Solaro assigns error to the trial court's consideration of the settlement offer extended by Solaro in its determination that Solaro lacked a meritorious defense. The court's judgment entry reads in part:

> "***.
>
> "Further, under the guide of GT Automatic Electric, Inc. v. ARC Industries, Inc. 47 Ohio St. 2d 146, 1 Ohio Ops. 3d 86, [sic] it is important to note that a meritorious defense must be proffered. The testimony here is that the defendant offered $20,000 to

> settle the matter and certainly leads one to believe that there is questionable merit to the defense of this cause of the plaintiff. This is sustained by the Defendant's affidavit saying he has a legitimate and valid defense without indicating the actual 'meritorious defense' required."
>
> "***."

Evid. R. 408 generally provides that neither evidence of settlement negotiations, nor evidence of conduct or statements made thereby, is admissible to prove liability for or invalidity of a claim. Thus, the trial court's conclusion assigning questionable merit to Solaro's defense of the action, buttressed upon Solaro's offer to settle the matter, is clearly erroneous. Accordingly, Solaro's fourth error assigned is sustained.

We note, however, that the requirement of demonstrating a

mertitorious defense to the action is but one portion of the three-part, conjunctively phrased test set forth by GTE Automatic Electric, supra. Thus, even assuming that Solaro met the requirement of presenting a meritorious defense, he has failed to satisfy the remaining requirements, as determined by our disposition of the preceding assignments of error.

The judgment of the trial court is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant

to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

JERRY L. HAYES
FOR THE COURT

CACIOPPO, P. J.
BAIRD, J.
CONCUR

(Hayes, J., Judge of the Domestic Relations Court of Portage County, sitting by assignment pursuant to Article IV, Section 5(A)(3), Constitution).

APPEARANCES:

ROBERT W. BLAKEMORE and FRANCES YATES, Attorneys at Law, 277 S. Broadway, Akron, OH 44308 for Plaintiff.

JAMES R. WILLIS, Attorney at Law, Suite 610, Bond Court Bldg., 1300 E. Ninth St., Cleveland, OH 44114 for Defendant.

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

MONICA CASALINOVA	)	CASE NO. CV 88 11
	)	3625
Plaintiff	)	
	)	JUDGE MURPHY
-vs-	)	
	)	
LOUIS SOLARO	)	JUDGMENT ORDER
	)	
Defendant	)	

- - -

Upon the Defendant's motion to vacate the within default judgment granted by this Court December 30, 1988, was heard under the authority of the Ohio Rules of Civil Procedure 60(B). Both parties being present and evidence adduced, the Court finds as follows:

1. A complaint was filed by the Plaintiff November 9, 1988 and served upon the Defendant November 17, 1988. The answer date was then 28 days therefrom or December 15, 1988.

2. The Defendant then contacted James Barbuto a non-lawyer to transmit to Plaintiff's counsel an offer of $20,000 to resolve the case which was refused.

3. The said James Barbuto then relayed to the Defendant that he was "not to worry" about the answer date.

4. This Defendant knew of the answer date and the necessity for an answer within a certain time.

5. After the answer date had passed and on the 20th day of December, 1988, Defendant retained an attorney.

6. On the 28th day of December, 1988, the Plaintiff filed for default judgment, and the Court scheduled this matter for 8 a.m. on the 30th day of December, 1988. On that same date Defendant's counsel filed a leave to plead, which of course, was unknown to

the Court or counsel since it was filed after the hearing at approximately the same time a default entry was entered on behalf of the Plaintiff in this cause.

CONCLUSIONS OF LAW

The Defendant files an application for relief from judgment based upon procedural rule 60(B)(1) and (5).

In the pleadings, the Defendant attempts to maintain the position that his actions were "excusable neglect." It is readily apparent that where the matter is referred to a lawyer or an insurance company and not timely filed, it may be claimed as excusable neglect and imputed to the client. Certainly where a non-lawyer is involved in the Court, we cannot allow this conduct or there would be chaos attendant within the system. This Defendant knew full

well of the answer date and his requirement to file said answer or obtain the services of an attorney.

While it is important to note that the said James Barbuto did not testify, nowhere in the record does it show that counsel for the Plaintiff indicated to Barbuto that he did not have to worry about the answer date. Each time that evidence was proffered, it was a statement made by James Barbuto to the Defendant or his agent wherein Mr. Blakemore was not present.

Further, under the guide of GT Automatic Electric, Inc. v. ARC Industries, Inc. 47 Ohio St. 2d 146, 1 Ohio Ops. 3d 86, it is important to note that a meritorious defense must be proffered. The testimony here is that the Defendant offered $20,000 to settle the matter and certainly leads one to

believe that there is questionable merit to the defense of this cause of the Plaintiff. This is sustained by the Defendant's affidavit saying he has a legitimate and valid defense without indicating the actual "meritorious defense" required.

In light of all of the above, the request of the Defendant to vacate judgment within must be denied.

It is ORDERED, ADJUDGED, and DECREED that Defendant's motion to vacate the within judgment be and is hereby denied.

Costs to the Defendant.

_____

JUDGE JAMES E. MURPHY

cc: Attorney Robert W. Blakemore
Attorney James R. Willis/Vicki L. Ward
Attorney Kay L. Williams
Attorney David A. Looney

pam